

United States Bankruptcy Court

Eastern District of Washington

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DATE: November 5, 2007

FROM: Ted McGregor

TO: Judge Kurtz, Judge Williams, Judge Rossmeissl, Bev Benka, Ian Ledlin, Joseph Harkrader, Tap Menard, Mike Todd, Tom Atwood, Jim Hurley, Jan Armstrong, Tony Grabicki, Bo Howell, James Murray, Dan Brunner, Gayle Bush, Kevin O'Rourke, Gary Dyer, Jake Miller, Rolf Tangvald, Ford Elsaesser, Gary Farrell

SUBJECT: Notes of October 26, 2007 Committee Meeting

The Advisory Committee met the morning of October 26, 2007 in Spokane, Washington. Ford Elsaesser was the only member of the Advisory Committee that was not present. Judge Kurtz and Tom Atwood welcomed everyone to the meeting.

Chambers Report

Judge Rossmeissl began the meeting with his report of the Yakima chambers remodeling project. He indicated that the remodeling project is approximately 80 to 90 percent complete. Judge Kurtz reported that the Yakima courtroom will not be finished until February, 2008. In the meantime, Yakima will be holding court in the federal courthouse.

Judge Williams reported on the improvements being made to the courtrooms in Spokane. She indicated that there is a project to improve the lighting in the "new" courtroom, which is expected to begin in November. Additionally, she indicated that the acoustics in the historical courtroom are being improved. Judge Williams reported everything is going fine in her chambers. She reported that the majority of her big cases are essentially wrapping up this month. Due to her large volume of cases, a lot of her cases were assigned to the other judges. She indicated that they will be going back to the old procedure for assignment of cases.

Judge Kurtz reported that the court is spending a significant amount of money on courtroom technology and described some of the changes that are being made to the courtrooms. The new technology being installed in the courtrooms is not the same as the ELMO system used by District Court. Judge Kurtz suggested that perhaps the Clerk's Office would agree to demonstrate the equipment to interested parties. Ted McGregor indicated that the NOMAD system we currently use is a system sponsored by the judiciary. He reported that the court has demonstrated how to use the NOMAD system to attorneys on several occasions.

Bar Association Report

Tom Atwood reported that after the conference at Sun Mountain, the Bar Association installed new officers. Tom is the President, Kevin O'Rourke is President-Elect, and Jeff Simpson is the Secretary. Tom expressed his thanks to Bev Benka, the out-going President and Recruiter.

Tom stated the Bar had a CLE seminar in Richland, Washington, on September 26 that was a success. According to Ian Ledlin, there were 49 paid attendees plus nine speakers. Tom thanked Kevin, Bev, Ian, Gary Farrell and Brent Sorenson. The seminar was very educational and the Bar Association made a small profit on the event.

He indicated they plan to set a meeting sometime in November to address the budget and other items. Tom indicated that if anyone has agenda items to please contact him.

Tom reported that he spoke to Terry Preszler, who is on the Board, but who has quit practicing any sort of bankruptcy. Terry indicated to Tom that the Board position was better served by somebody who is actively practicing bankruptcy. Due to Terry's departure, there will be an opening on the Board.

Clerk's Office Report

Ted McGregor said that for those of the attendees traveling to attend this meeting, per diem is available. He advised the attendees to call his secretary, Kathleen, if they need per diem. He said that this meeting is being recorded and he will provide them with a report as soon as possible.

Ted indicated that filings this year have increased slightly. The filings actually went down between August and September. In 2006, 3350 cases were filed in our district. In 2007, he anticipates 4,300 cases being filed, which is only about a 23% increase over last year. Before the bankruptcy reform, filings averaged around 10,000 cases a year. Our filings are down approximately 43% based on that figure. Nationally, courts our size are averaging a 30% increase.

Ted reported that bankruptcy judges and clerks are very interested in filing statistics and trends because of the budget. He indicated that the Administrative Office ("AO") has treated 2007 and 2008 as anomalies, and therefore it has not made any drastic changes to the budget. In 2009, we are hoping there will be more cases filed. The AO is also looking at the effect of BAPCPA on the

business of the court. They are finding that there are almost as many docket entries, even though there are a reduced number of cases. Ted indicated that a lot of the docket entries are automatically done. Locally, the court gets an allowance for personnel, which is the largest portion of the budget. We can transfer those funds to other areas, such as automation, which our court has done and the court operates at about 70% of our allowed budget. Ted indicated that in 2008 we will lose budgeting for eight positions, but expect no layoffs.

Ted reported that there is a change in the Clerk's Office. Matt Kirsch, who does the statistics, is leaving for West Virginia District Court on November 9. Denise Schuster, a long-time Case Administrator, is his replacement. The Court is also hiring another Case Administrator in Yakima.

Ted indicated the Clerk's Office checks 100% of all electronically-filed items. For calendar year 2007, over 90,000 docket entries were made by outside users. There were about 60,000 docket entries made by inside users. After checking all of the outside docket entries, the court found only 1,377 errors, which is less than a 1% error rate. Almost all major creditors file their claims electronically with pro se filers representing less than 5% of filings.

CM/ECF is a nationally produced system, and this court does not apply a lot of local innovations to that system. This weekend, the court will be upgrading to version 3.1.6 of CM/ECF. Primarily, the new version adds some additional statistical reporting required by BAPCPA and also updates the change in national forms, which will take effect on December 1, 2007. One of the forms that has changed is the Proof of Claim. We have a local Proof of Claim form that 35% of our claimants use. The national form has accepted many of the changes that this court initiated a few years ago. Ted believes we could possibly now drop the local form. In Spring of 2008, there will be a major update of CM/ECF, which will address approximately 140 modification requests. One of the big issues nationally is whether to upgrade ECF or to develop a brand new system. The thought process is that computer programs such as ECF last about 10 years and it has been about 10 years since ECF was initiated. Some feel that ECF should be completely rewritten, and some feel it can be done by modifications. Generally, the Clerk's Office is above standards. In most cases, orders are addressed the day after they are filed, and either signed by the deputies as an administrative order or sent to the judges for consideration.

Ted reported that the national statisticians think that the case filings will reach approximately 75% of prior BAPCPA filings but he is not sure that is true. Congress is talking about some fix to the mortgage problems. Ted said that if we listen to the people who predict the economy, they say bankruptcy is going to have a heyday again. He indicated that he listened to a statistician about a year ago, and he said that the reason why bankruptcies didn't rebound is because debtors did not think they could file bankruptcy anymore. Judge Williams said that these statisticians are dealing with national figures. She indicated that locally our filings do not seem to be growing as quickly as many parts of the nation, and locally it can vary a great deal from the national trends.

Judge Williams introduced her extern, Bo Howell, to the attendees. Bo is the recipient of the Hanel Scholarship and she indicated that Bo is doing a great job.

Judge Williams brought up the issue of whether there is a perception that order processing is being delayed. Tony Grabicki indicated that he thought the order process moves pretty quickly.

Judge Kurtz introduced the court librarian, James Murray. James reported that his job is to provide information to the courts. He provides the courts with daily updates on bankruptcy information, e.g., news articles, budget issues, and BAP decisions. He indicated he has a collection of bankruptcy resources in the library. James reported that there is going to be Westlaw training on Thursday, November 29. He said he attends the advisory meetings so he can be aware of the things the court is working on so he can hopefully be helpful in providing information. Judge Kurtz indicated that James is their go-to-guy for complicated research projects concerning legislative history and other issues. Rolf Tangvald commented that he uses James on numerous occasions, and that James is a wonderful resource. Jan Armstrong asked if private attorneys could use James as a resource, and James indicated he would be happy to assist them on bankruptcy information.

U.S. Trustee Report

Gary Dyer reported that Jake Miller is back, however, he is in Washington, D.C. for five days. Gary indicated that at the last meeting he discussed what he hoped was an anomaly about the concealment and non-disclosure of assets. He indicated the concern has not abated. Gary reported there is training scheduled for our panel trustees on November 5 in Spokane. Jake has given up his position in Washington, D.C., however, there is some residual work to be completed.

U.S. Attorney Report

Rolf reported they have a new temporary Attorney General, Peter Keisler. Rolf indicated he talked with the state agencies and they do not have anything to bring to the attention of the committee by way of frustrations or things that they think need changed. His office believes the system is working smoothly. If there are any concerns for the federal and state taxing agencies that anybody may have, Rolf would be happy to take those concerns to the respective agencies. He reported they have a couple of new IRS people in the Spokane. They made a decision to bring someone here before Dan Morgan retires in about 18 months. If anyone has a problem with the IRS, Rolf requested that people call him directly.

Judge Kurtz reported that the judges have selected someone to succeed Ted McGregor, and introduced Bev Benka as Ted's replacement. Ted indicated he was the first Clerk of Court in this district. Judge Rossmeissl said that Laura Hammock was the Chief Clerk that supported Referee Mike Kerley prior to the Code. Ted discussed how the referee system worked in earlier years; the Bankruptcy Code of August 1979 authorized a Clerk of Court and Judge Hanel appointed Ted, who was equal in stature in all respects to the U.S. District Court Clerk. Judge Rossmeissl spoke about Mike, the referee, and Ted said that Mike was appointed in 1942 and was replaced by Judge Hanel in 1973, when there were significant changes in the national bankruptcy rules. That is when the referees started wearing black robes and actually had many more judicial duties. Bev suggested that Gary Farrell document that history and publish it in Bankruptcy Notes for everyone's benefit.

Chapter 12 Office

No one was at the meeting from the Chapter 12 Office. Ted reported there were 10 Chapter 12 cases filed in 2005, eight cases filed in 2006, and currently in 2007, two cases have been filed.

Chapter 13 Office

Dan Brunner indicated that the Trustee's office will suffer due to Bev Benka leaving for the Bankruptcy Court, and he announced that Mike Todd will replace her.

Dan reported that currently they have 276 unconfirmed cases as of the end of September. Of those, 17 are over 91 days old. Cases are moving along pretty rapidly through the system. The total number of cases filed through the end of September is 764, while the total number of cases filed for all of 2006 was 849. Dan indicated his office should be better this year in terms of total filings compared to last year.

For the fiscal year ending September 30, 2007, the office disbursed \$27,772,000. It was not a bad year considering the filings had dropped off significantly. In 2006, his office disbursed over \$30,000,000. The drop-off in dollars wasn't really as significant as he would have expected. Dan believes there are fewer driver's license recovery cases and more people trying to keep their homes. His office is running well and ECF is going very smoothly. Judge Kurtz asked Dan if he will have to make any staffing changes based on the numbers and Dan indicated that he won't at this point, as the numbers are supporting his current staff.

Gayle Bush asked Dan if he is going to lose a lot of money due to all the trailing cases closing out. Dan indicated that it certainly is in the mix. Dan reported that their highwater mark was probably about 5,400 cases, and right now they are down to 3,300 cases. Dan indicated they are experiencing the closing of cases from the larger years. In 2002, they had a total of 2,423 cases filed, and in 2006, they had 849. The interesting thing is that a lot of those 2002 cases were the small dollar a month cases. Now there are a smaller number of cases with a higher dollar amount.

Dan was questioned whether he sees any impact in his existing cases arising from adjustable rate mortgages and he indicated he does not see an impact at this point. He believes that part of the problem is the declining value of the property, the high debt on the property, and the increase in the monthly payment, which debtors can't afford. Dan indicated there is current legislation pending to permit mortgages to be modified in Chapter 13s, but Judge Kurtz believes that they are not going to pass that legislation. Dan did not agree with that as there is a lot of talk about some type of a bail out. Using the Chapter 13 system would be a low cost solution that would not require a whole lot of federal funds to allow people to modify their mortgages.

Judge Williams asked what Dan's policy is about dismissing for non-payment and if he has changed it. Dan indicated that they still have the three-month rule. If the debtor is three months delinquent, they file a Motion to Dismiss. Dan indicated they are trying to be kinder and gentler on how they

push those motions through the system. The reason for that is because the consequences of a dismissal in bankruptcy now are so much more significant than pre-BAPCPA.

Report From Out of District

Gayle Bush reported they are at a pretty low level in terms of filings in Western Washington. Commercially, some significant Chapter 11s were filed this year, which has kept some of the firms afloat. The Port Townsend Paper case involves hedge funds and their plan was confirmed roughly six months after the case was filed. It was a speedy, more prominent case in Western Washington. The Brown & Cole Stores case has been in bankruptcy for about 12 months. Gayle reported that Section 503(b)(9) is a huge change for bankruptcy. He advised that that Code section is really where legal energy has been spent in his office trying to figure out how to deal with it. Section 503(b)(9) pertains to goods purchased on credit within 20 days of bankruptcy being reclaimed. In the Port Townsend Paper case, about \$4,000,000 of trade fit into that category, and in the Brown & Cole Stores case about \$9,000,000. Gayle believes that there will probably be more cases in the next couple of years because there has been so much over borrowing and over lending. Gayle indicated that in his cases everyone insists on releases for everyone. In the Ninth Circuit, there are cases that make it hard to get third-party releases and injunctions. Gayle reported that for the last 3 or 4 years, he has seen lot of attrition in bankruptcy lawyers working on other types of cases. A lot are doing commercial litigation or secured financing transactions and many firms have shrunk down, with people changing over and doing other things. Gayle's firm is seeing more business now, and he believes he will see a gradual increase in the level of commercial work.

Judge Kurtz introduced Gary Farrell, the editor of Bankruptcy Notes. Judge Kurtz addressed his appreciation for Gary's efforts as editor. Gary indicated that he intends to interview Ted McGregor next month for the upcoming issue of Bankruptcy Notes. Judge Kurtz indicated that there are judges from California and Oregon that read Bankruptcy Notes and are very complimentary of the quality of the articles.

Chapter 7 Trustee Report

Tony Grabicki indicated that he did not have much to report. Chapter 7 cases are down and he is hoping that they will pick up at some point. The good news in having a reduced case load is that it allows trustees to catch up on old cases. Joe Esposito, one of the long-time panel trustees, is no longer on the panel. Joe has gone to a semi-retired status so we are down to four Chapter 7 trustees in Spokane. It is Tony's understanding that the U.S. Trustee's Office doesn't feel there is a need to add a fifth trustee in Spokane in light of the case load.

Chapter 13 Sub-Committee

Judge Kurtz cancelled the meeting of the Chapter 13 Sub-Committee. He believes there is one issue concerning "910 property" that is going to come up. This is anything of value purchased within one year of filing, and if you are going to retain it or surrender it, you have to pay what you agreed to pay.

There is no cram down for retention and no discount for giving it back. Judge Kurtz indicated that Judge Williams has issued an opinion on a related subject which talks about what our plan says about property that is surrendered, and the secured portion being paid by the surrender and the remaining portion being paid the same way as an unsecured claim.

Judge Williams is not sure that the analysis that she used will be viable under recent circuit law. Joe Harkrader indicated that he thinks the plan was meant to deal with personal property, but Judge Williams' decision concerned real property. Judge Kurtz stated he has reviewed plans with 910 property so he believes the issue will soon be raised in our district to interpret our form plan. Dan Brunner indicated that currently they treat deficiencies as unsecured. Judge Kurtz indicated the impact of the decisions is that the debt is neither secured or unsecured. Bev Benka directed the committee to Judge Kurtz's decision issued in the Tom and Tiffani Hibbs case, No. 05-11474. Judge Kurtz indicated that this court will follow that decision and suggested that we change the Chapter 13 Plan to be consistent with that decision. Jan Armstrong indicated that it should be an additional clause in that section of the plan because the plan also deals with non-910 property. Dan Brunner felt we should create a working group to work on the necessary changes to the Chapter 13 Plan.

Ted said a lot of claims are filed electronically. Sometimes when they are filed non-electronically, the court does the filing and therefore makes the selection based on what has been presented to the court. That has always been a problem expecting the courts to make some decisions about the characterization of property and the court's claim summary should not be taken as fact; Proofs of Claim must be reviewed. Ted believes that although we may not need to change the local rule, the plan might benefit from a change, not to resolve the issue of how 910 property is handled, but to bring the issue to the attention of the person who is completing the plan.

Judge Kurtz believes that a working group should be formed for re-drafting the Chapter 13 Plan. Participants in the current working group include Ian Ledlin, Dan Brunner, Jan Armstrong, Vannoy Culpepper and Bev Benka. During Ted's remaining tenure, he will take on the task of organizing the working group.

Judge Williams indicated nationally there has recently been a lot of attention given to the filing of Proofs of Claim, primarily by mortgage companies. Judge Williams questioned whether the U.S. Trustee or the 13 Trustee are getting any sort of directives into looking at this issue. Gary Dyer indicated that that is one thing that Jake is going to look at. There is a question on how to approach those things. Most times the attachments and numbers don't match. Trying to get a truthful statement of what is owed is a problem. Dan Brunner said the for the last couple of years, the National Association of Chapter 13 Trustees has been trying to work out some of the issues. Dan Brunner indicated that he has a list of names and contacts of mortgage lenders from all over the country and would provide it to debtor lawyers on request. Gayle Bush put a sub-prime mortgage company in bankruptcy earlier this year. They make loans over a three-month period and then they package them together. They had their own servicing entity and when the loan closed, the original file went to their servicing agency. They package them together, they are bid on, and then the loans are physically transferred to the new owner. That new owner typically has its own captive servicing

agency. A lot of time these mortgages have a kick back provision, where if it goes into default within a certain number of months it has to go back to the original mortgage company. All of these repurchase agreements cause those original packages to get fragmented with physical files and information scattered.

Old Business

Judge Kurtz spoke concerning the exemption working group. This was a problem that he created by holding that a Chapter 7 Trustee not only has to file but they also have to mail out their objection to debtor's exemptions. This matter has been taken up on appeal. It was affirmed by the District Court judge and now it is at the Ninth Circuit. Ted advised the case has been assigned to mediation. Judge Kurtz indicated the issue on appeal is whether the rule requires both filing and serving within 30 days. Rolf indicated that every civil case that he has that goes up to the Ninth Circuit is assigned a mediator. Rolf advised it is a technical step that they put on any non-criminal case.

New Business

Ted reported there are a series of rules that take effect December 1, 2007. Based on his review of the changes to the national rules, Ted suggested two changes to our current local rules. The first one relates to Rule 3007-1. If a demand for relief as specified in 7001 is joined with an objection to claim, it becomes an adversary proceeding. That language was deleted from the national rule. Ted suggested in our local rule that we remove that same language by deleting subparagraph (e) of our local rule. Rolf moved to recommend to the judges that the change to Local Rule 3007-1 be accepted and Kevin O'Rourke seconded Rolf's motion. The changes to Local Rule 3007-1 was unanimously approved.

Ted reported that the national rule 4001(b) relates to the use of cash collateral, and it now states that a motion "shall be accompanied by a proposed form of order." Under 4001-2(1)(A), Ted suggested adding "shall file and serve a motion, along with a form of the order as an attachment as required by FRBP 4001(b)" as in this District, we don't file orders, we submit orders. If that order is satisfactory, then it can be submitted under our E-Orders program electronically and dealt with in the ordinary fashion. Rolf moved to make the change to Rule 4001-2.

Ted indicated another part of the national rule concerns agreements as to the use of cash collateral; it requires that any time the parties agree, they send out notice of the agreement with a copy of the order, which would apply to "first day" orders. Ted indicated that this group has had some discussion on having some kind of "first day" order rule, however this court has never adopted that. Gayle Bush indicated that typically any proposed order changes should go through negotiation prior to the hearing. There was discussion regarding the impact of deleting the term "contested" from the local rule and whether that would be contrary to § 363(c)(2). Kevin and Jan discussed this as well as the local rules impact on the negotiation process. Ted indicated that the notice of an agreement regarding cash collateral is unsettled. To the extent notice to use cash collateral is required, it doesn't make any difference whether or not it is contested. Kevin indicated that maybe it should be

changed to “authorization for use.” Kevin believes there has to be some qualifier there. Rolf believes “authorization for use of cash collateral” is a better term because “contested” suggests that the creditor has to do something to contest it rather than it being the burden of the debtor to receive permission. Tony Grabicki suggested a change to the language in 4001-2(1)(A) to say “a trustee or debtor-in-possession desiring to use, sell, or lease cash collateral without the consent of the secured creditor.” Judge Kurtz suggested a committee be formed to address proposed changes to Local Rule 4001-2. Members of the committee will be Kevin and Rolf and they will submit their proposed changes to Ted who will submit them to the judges for their consideration. All attendees unanimously agreed to proceed in this fashion.

Dan Brunner addressed national rule 3004. The new rule superceded the old rule to the extent that if the debtor or trustee filed a claim on behalf of a creditor, the creditor then could file an amended claim on its own behalf and that would supercede the claim filed by the debtor or trustee. In the old rule, the debtor could file that claim anytime after the meeting of creditors and 30 days after the bar date. Now in rule 3004, the debtor can only file a claim within the 30-day window after the bar date and the creditor cannot file a claim and trump that claim filed by the debtor. Dan believes this has the potential of creating some real anomalies. Jan Armstrong indicated as plans are getting confirmed so quickly, he has to file a secured claim or the car or house payment doesn’t get paid. Dan said that when the creditor files a claim, then they will treat it as superseding the claim filed by the debtor or trustee. This issue will be addressed in the next edition of Bankruptcy Notes. Ted reported that there are two seats on the Advisory Committee that will be expiring as of June, 2008. Jake Miller will nominate a panel trustee member and the court will solicit to fill the out-of-district seat.

The Committee members discussed the scheduling of the next Advisory Committee and Chapter 13 Subcommittee meetings. **The next meeting for the Advisory Committee will be in Yakima on Friday, March 21, 2008. The meeting for the Chapter 13 Sub-Committee will be held via telephone conference on Wednesday, March 5, 2008 at 3:00 p.m.**

The meeting was adjourned.